IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Civil Writ Petition No 178 of 2001.

Judgment reserved on 9.4.2007.

Date of decision: 24.4.2007.

M/s Manali Resorts ….**Petitioner.**

Versus

State of H.P. and others ……**Respondents.**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud, J.
The Hon'ble Mr. Justice Rajiv Sharma, J.

Whether approved for reporting?[1]

For the Petitioner(s) **Mr. M.M.Khanna, Sr. Advocate, with Ms. Pushpa Attri, Advocate.**

For the Respondent(s) **Mr. M.S.Chandel, Advocate General, with Mr. J.K.Verma, Deputy Advocate General.**

Per Rajiv Sharma, J.

The petitioner has challenged the assessment under the Himachal Pradesh Tax on Luxuries (in Hotels and Lodging Houses) Act, 1979 (hereafter referred to as 'the Act') made by the Deputy Excise and Taxation

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[1] *Whether reports of Local Papers may be allowed to see the judgment?*

Commissioner (Assessing Authority), Flying Squad, North Zone, Dharamsala, vide Annexure P-1, the appellate order passed by the Excise and Taxation Commissioner vide Annexure P-2 and levy of penalty by the Deputy Excise and Taxation Commissioner vide Annexure P-3 and order dated 9.11.2000 Annexure P-4.

Brief facts of the case are that respondent No. 3 carried out inspection of the premises of the petitioner on 14.5.1998. The case set up by the respondents is that during this inspection the available record was seized in order to ascertain the evasion of tax by the petitioner since 1995. It is further submitted that the record was thoroughly examined and details were worked out for the years 1994-95 to 1997-98 up to 31.12.1997. The case pleaded by the petitioner was that they had suffered because of a natural calamity, as the hotel of the petitioner was damaged substantially and a part of it was washed away due to flood in Beas River and the petitioner had to spend huge money for flood protection measures. The road connecting the town had also been washed away and in these circumstances tax could not be paid as the petitioner was suffering financial losses. The

explanation was rejected and accordingly the liability of the petitioner worked out by respondent No. 3 for the years 1993-94, 1994-95, 1995-96, 1996-97 and 1997-98. While disposing of the case, he observed that penalty under Section 7 (7) of the Act will be taken up separately. Appeal No. 20/98 (Annexure P-2) was filed before the Excise and Taxation Commissioner, respondent No. 2, who accepted the fact that the petitioner had suffered damage on account of floods and in the circumstances; there was no culpable intention on the part of the appellant to evade tax. However, for the year 1993-94, this explanation was not accepted as the calamity pertained to the subsequent year. While assessing the penalty imposed, it was reduced. Subsequently, vide Annexure P-3; proceedings under Section 7(9) of the Act were taken up by respondent No. 2 and he levied a penalty of Rs.5,00,000/- and appeal to respondent No. 2 rejected vide Annexure P-4.

Learned senior counsel appearing for the petitioner has urged that the orders deserve to be quashed and set aside as they are without jurisdiction. Submission of the learned counsel is

that according to Section 2(a), the Deputy Excise and Taxation Commissioner cannot be constituted as an assessing officer. The relevant provision may be noticed:

> **"2.-------**
> **[(a) "assessing authority" means the Assistant Excise and Taxation Commissioner or the Excise and Taxation Officer, appointed under sub-section (1) of Section 3 of this Act and conferred the powers under sub-section (2) of section 3 thereof for carrying out the purposes of this Act;]".**

He has drawn our attention to Section 2(cc) which states that the Excise and Taxation Commissioner means the Deputy Excise and Taxation Commissioner, appointed in accordance with Section 3(1) of the Act to assist the Commissioner and includes the Joint Excise and Taxation Commissioner. Similarly, section 2(b) defines Commissioner to mean the Excise and Taxation Commissioner appointed in terms of Section 3(1) of the Act. Learned counsel submits that the purpose of referring to these provisions is to show that the Act clearly demarcates and defines the ambit and authority of each officer. Learned counsel submits that according to the Himachal Pradesh Tax on Luxuries (in Hotels and Lodging Houses) Rules, 1979, the expression

"Appropriate Assessing Authority" is defined under Section 2(b) as:

> **"2.-------**
> **(b) "Appropriate Assessing Authority" in respect of any particular proprietor means the (Assistant Excise and Taxation Commissioner or the Excise and Taxation Officer), within whose jurisdiction the hotel or guest house is situated or if the proprietor has more than one hotel or guest house in Himachal Pradesh, the (Assistant Excise and Taxation Commissioner or the Excise and Taxation Officer) within whose jurisdiction the head office in Himachal Pradesh of such hotels or guest houses is situated, or such other persons as may be appointed under sub-section (1) of section 3 and conferred the powers under sub-section (2) of section 3;"**

The case pleaded by the petitioner is that the orders Annexures P-1 to P-4 which have been passed are without jurisdiction and void ab initio. The Deputy Excise and Taxation Commissioner cannot exercise the powers of the assessing authority. According to Section 2(a), assessing authority means the Assistant Excise and Taxation Commissioner or the Excise and Taxation Officer. Learned senior counsel submits that respondent No. 3 Deputy Excise and Taxation Commissioner has been vested with appellate powers under Section 8 of the Act. Similarly, the

Commissioner who has passed the order Annexures P-2 and P-4 could not exercise appellate powers since the Act does not confer such powers on him and he can exercise only revisional jurisdiction in the circumstances as contemplated by Section 9 of the Act.

We have heard learned counsel for the parties and gone through the record.

It would be trite for us to observe that no authority can exercise powers which are not conferred upon it by the statute. We have gone through the Act and the Rules and do not find any provision empowering either the Deputy Excise and Taxation Commissioner or the Commissioner to exercise the powers of assessment or appeal respectively. The entire exercise has been undertaken by the respondents in grave violation of the provisions of the Act. The orders passed by them cannot be sustained.

Learned counsel has drawn our attention to judgment of the Punjab and Haryana High Court in Vipan Kumar Jain and others v. Union of India and others (2001) 17 PHT 588 (P&H) in which a Division Bench of that Court has held that the officer taking the search or a member of the raiding party becomes a witness to

the proceedings of such search and cannot be authorized to make a regular assessment. We are in agreement with the principles of law laid down in the judgment. Learned counsel has submitted that the proceedings imposing the penalty vide Annexure P-3 by respondent No. 3 and rejection of the appeal preferred by Annexure P-4 again by the Commissioner are ultra vires the provisions of the Act. He has placed reliance on a judgment of the Hon'ble Supreme Court in Hindustan Steel Ltd. V. The State of Orissa (1970 XXV Sales Tax Cases 211, holding that whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion which has to be exercised judicially and on consideration of all relevant circumstances. Their lordships further held that even when the barest minimum penalty is prescribed, the competent authority may not impose such penalty when there is a technical or venial breach of the provisions of the Act or some bonafide ground for non payment of tax etc.

On going through the record, we find that the order imposing penalty Annexure P-3 displays pre

disposition of the mind of respondent No. 3. Further, the imposition of penalty is without any authority, as the Deputy Excise and Taxation Commissioner is not vested with such powers. Under the Act, penalty for non payment of luxury tax is provided for under sub-section (7) of Section 9. This is to be imposed during assessment proceedings when the officer satisfies himself that there has been deliberate evasion of tax etc. Section 7(b) imposes a liability to pay interest.

Learned Deputy Advocate General appearing for the State has drawn our attention to Notification dated 18.1.1992 whereby, all Excise and Taxation Commissioners except those posted at the barriers to assist the Excise and Taxation Commissioner have been designated as officers to assist the Commissioner for carrying out the purposes of the Act within their territorial jurisdiction. The submission made by learned counsel is that the orders passed are within the jurisdiction of the officer. He has referred to sub-section (6) of Section 6 of the Act to submit that if a particular person has maintained false or incorrect account with a view to suppressing any tax

liability etc., the Excise and Taxation Commissioner or any other officer appointed to assist him under sub section (1) of Section 3 may after affording such proprietor a reasonable opportunity of being heard, direct him to pay penalty which shall not be less than 25% etc. Submission of the learned counsel is that the order imposing penalty is valid and in accordance with law. Learned counsel has also stated that the power of imposition of penalty is vested in the Commissioner and any person appointed to assist him and, therefore, the order cannot be faulted. He has referred to various decisions of the Apex Court to the effect that if the exercise of power can be traced to a legitimate source, the fact that it is exercised under different provision would not render such exercise as illegal. There can be no dispute to the proposition of law as reported in J.K.Steel Ltd. Versus Union of India and others (AIR 1970 SC 1173), but we have not been shown the source of the power exercised by both respondents 2 and 3. They have been constituted under the Act as the appellate and the revisional authority. Reliance placed by the State on this judgment is misplaced. In that case, the Hon'ble

Supreme Court has held that the exercise of power should be traced to a legitimate source and its exercise under a different power does not vitiate it. We find that in the present case, both the parties have acted beyond the scope of the power vested in them. This submission made by the learned Deputy Advocate General is, therefore, rejected. Sequentially an assessment was framed by the Deputy Exercise and Taxation Commissioner who was incompetent under the Act to do so. He was the appellate authority under Section 8. How and under what circumstances, he assumed the power of an assessing authority has not been explained either on fact or in law. The provisions of the Act are clear and do not admit of any doubt. The category of officers and their respective field of authority are clearly defined and demarcated. The Commissioner exercises only revisional jurisdiction under Section 9 of the Act and cannot constitute himself to be an appellate authority. The jurisdiction and the grounds of exercise of both powers are clearly defined under Sections 8 and 9 of the Act which do not overlap. The

entire exercise which has been undertaken by the respondent is ultra vires the provisions of the Act.

It has also been submitted that the petitioner has acquiesced in the action of the respondents and it was the petitioner who had filed the appeals before the Commissioner. This submission has been made only to be rejected. It is by now well settled that jurisdiction cannot be the subject matter of an agreement inter se between the parties but is conferred by a statute which demarcates the field of powers and authority of each officer. No officer can assume jurisdiction not conferred on him by the express words of the statute. Further the fact that the petitioner had approached the respondents in appeal under the mistaken belief that the appellate jurisdiction would vest in the Commissioner since he is higher in rank than the Deputy Excise and Taxation Commissioner, cannot alter the statute. The substantive provisions are mandatory and absolutely clear. The respondents cannot assume jurisdiction and powers for performance of acts which are not conferred by the statute. We find that the present case is one of inherent lack of jurisdiction in the respondents

and any order passed by them would be a nullity. (See *Kiran Singh and others v. Chaman Paswan and others, AIR 1954 SC 340, at p. 342; Balai Chandra Hazra v. Shewdhari Jadav, AIR 1978 SC 1062, at page 1068, paragraphs 10, 11 and 16; Sarwan Kumar and another v. Madan Lal Aggarwal (2003) 4 SCC 147, paragraph 211).* It is by now well settled that where there is want of jurisdiction, the whole proceedings are *coram non judis*. (See *P. Dasa Muni Reddy v. P. Appa Rao AIR 1974 SC 2089, at page 2091).*

We find that present case is one of lack of inherent jurisdiction. We are not impressed with the arguments of the learned counsel for the respondent that acquiescence has granted legality to the orders Annexures P-1, P-2, P-3 and P-4. We also do not accept that the orders can be upheld under Section 6(6) of the Act. In the facts and circumstances of the case, this writ petition is allowed, Annexures P1, P-2, P-3 and P-4 are quashed and set aside. The matter will be decided afresh in accordance with law by the competent officer. No demand in the

interregnum shall be raised against the petitioner. There shall be no order as to costs.

(Rajiv Sharma), J. **(Dev Darshan Sud), J.**

April 24, 2007(PC).

CWP 178 of 2001.

24.4.2007 Present: **Mr. M.M.Khanna, Sr. Advocate, with Ms. Pushpa Attri, counsel for the petitioners.**

Mr. M.S.Chandel, Advocate General, with Mr. J.K.Verma, Dy. AG, for the respondents.

Writ petition disposed of vide separate judgment of the day placed on the file.

(Dev Darshan Sud), J.

April 24, 2007(PC). **(Rajiv Sharma), J.**